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JOHN F. DAVIS, CLE

No. 294

In the

Supreme Court of the United States

OCTOBER TERM, A.D. 1967.

JIMMY WILLIAMS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1967.

No.

JIMMY WILLIAMS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, Jimmy Williams, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the Circuit Court of Cook County, County Department, Criminal Division was entered on September 20, 1965, and is not reported.

The opinion of the Supreme Court of Illinois affirming said judgment, was filed on March 27, 1967 and is set forth in Appendix A. The opinion is reported in 224 N.E. 2d 225.

JURISDICTION

The opinion of the Supreme Court of Illinois was entered on March 27, 1967.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

A. DOES AN AFFIDAVIT FOR A SEARCH WARRANT THAT IS BASED UPON HEARSAY REQUIRE CORROBORATION WITHIN THE KNOWLEDGE OF THE AFFIANT?

B. DOES AN AFFIDAVIT FOR A SEARCH WARRANT BASED UPON HEARSAY REQUIRE FACTS STATED IN THE BODY OF THE AFFIDAVIT TO SHOW HOW THE AFFIANT REACHED THE CONCLUSION THAT THE INFORMERS WERE RELIABLE?

C. CAN A PERSON BE CONVICTED AS A SECOND OFFENDER UNDER A STATUTE THAT WAS ENACTED YEARS AFTER HIS FIRST OFFENSE AND ESPECIALLY WHERE HIS FIRST OFFENSE WOULD NOT BE AN OFFENSE UNDER THIS STATUTE IN ITS PRESENT FORM?

STATEMENT OF THE CASE

Prior to his trial the Defendant made a Motion to Quash certain counts of the indictment that charged him with being a second offender under the gambling statute. The defendant's motion was based upon the theory that the gambling statute under which he was indicted did not go into effect until January 1, 1962 and his previous conviction was in 1958. The trial Court sustained the defendant's motion and dismissed the indictments where-

upon the State appealed and the trial court was reversed in *People* v. *Williams,* 59 Ill. App. 2d 217.

The felony counts were reinstated against the defendant and he was ordered to stand trial.

Prior to this trial the defendant filed a motion to quash search warrant (attached together with affidavit as Appendix B) and suppress the evidence seized thereunder.

He based his motion on the fact that the affidavit for the search warrant was insufficient for the following reasons: (a) The affidavit was based upon information from two reliable informers, but there was no corroboration by the affiant. (b) There were no facts stated in the affidavit to show how the affiant determined the reliability of the informers.

The motion to quash the search warrant was denied and the defendant then presented a petition to suppress all evidence seized that was not subject to seizure by the command of the search warrant, since the search warrant only listed a dice table and dice as items to be seized. The defendants alleged that certain personal papers, business cards and hunting paraphernalia were seized.

The trial Court sustained his petition in part and suppressed all items except certain business records, a telephone bill in the name of the defendant, and certain business cards bearing the nickname of the defendant.

The defendant proceeded to trial and during the trial evidence was introduced to show that he had been convicted of being the keeper of common gambling house on April 12, 1958 in violation of Paragraph 325, Chapter 38, Illinois Revised Statutes, 1957.

At the conclusion of the trial, the defendant was found guilty on two counts, to-wit: (a) being a second offender

under the charge of keeping a gambling device, Section 28-1 (a) (3), Chapter 38, Illinois Revised Statutes, 1961 and (b) a second offender under the charge of keeping a gambling place in violation of Section 28-3, Chapter 38, Illinois Revised Statutes, 1961.

The Defendant was fined $1000 on each count and sentenced to six months on each count, the fines to be cumulative and the jail sentences to be concurrent.

The Defendant appealed to the Supreme Court of the State of Illinois which affirmed the trial in all particulars except striking the jail sentence on one count as being a nullity.

REASONS FOR GRANTING THE WRIT

A. THE INSTANT OPINION IS IN DIRECT CONFLICT WITH JONES vs. U. S., 362 U.S. 257 WHICH HOLDS THAT WHEN AN AFFIDAVIT IS BASED UPON HEARSAY THERE MUST BE CORROBORATION.

This Court has held in *Jones* v. *U. S.*, 362 U.S. 257; 80 S.Ct. 725:

> "Whether an affidavit which sets out personal observations, relating to the existence of cause to search, is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations, but those of another. An affidavit is not to be deemed insufficient on that score, SO LONG AS A SUBSTANTIAL BASIS FOR CREDITING THE HEARSAY IS PRESENTED."

But the opinion of the Supreme Court of the State of Illinois in the instant case goes far beyond the position of this Court and its own position when the Court states:

> "Furthermore, although not essential to establish probable cause, the informers' stories were corroborated by the affiant's statement that approximately two weeks before the informers first visit he had observed known gamblers enter the involved premises and stay for long periods of time."

Thus we see the Illinois Supreme Court has, with the stroke of a pen, done away with the necessity of corroboration of an informers story.

It can hardly be argued that the statement by the affiant could be corroboration, since these observations were made more than one month before the signing of the affidavit,

two weeks before the informers visited the premises, at hours other than those ascribed to gambling by the informers, and further, the affiant does not bother to identify any of those known gamblers.

B. THE INSTANT OPINION IS FURTHER IN CONFLICT WITH THE OPINION OF THIS COURT IN AGUILAR vs. STATE OF TEXAS, 378 U.S. 108; 84 Sup. Ct. 1509 WHICH STATES THAT THE AFFIDAVIT MUST STATE FACTS TO SHOW THE RELIABILITY OF THE INFORMER.

The affidavit for the search warrant in the instant case states merely:

> "• • • Two informers, who have furnished reliable information in the past, advise that they have witnessed gambling going on at the above-described premises, to wit, dice games frequented by numerous patrons. On 3/31/64, 4/8/64, 4/12/64, 4/13/64, and 4/15/64, these two informers gained entrance to the premises at 4025 W. 18th St.. • • •"

This Court has held in *Aguilar* v. *State of Texas,* 378 U.S. 108; 84 Sup. Ct. 1509:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States,* 362 U.S. 257; 80 S. Ct. 725, 4 L. Ed. 2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and SOME OF THE UNDERLYING CIRCUMSTANCES FROM WHICH THE OFFICER CONCLUDED THAT THE INFORMANT, WHOSE IDENTITY NEED NOT BE DISCLOSED, See *Rugendorf* v. *United States,* 376 U.S. 528; 84 S.Ct. 825, was "CREDIBLE" OR HIS INFORMATION "RELIABLE". Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magis-

trate," as the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferreting out crime," *Giordenello* v. *United States, Supra,* 357 U.S. at 486, 78 S. Ct. at 1250; *Johnson* v. *United States, Supra,* 333 U.S. at 14, 68 S. Ct. at 369, or, as in this case, by an unidentified informant."

But in the instant affidavit there are no facts stated to establish the reliability of the informer. There is no statement as to the nature of the information supplied in the past; no statement as to the results of the pursuit of this information; no statement as to when this information was given. And furthermore, the affiant does not state that he ever spoke to the informers but used the term advise: advised whom!

C. FURTHER, THE OPINION PERMITTED THE CONVICTION OF THE DEFENDANT ON A FELONY CHARGE AS A SECOND OFFENDER, WHEN HIS FIRST OFFENSE WAS COMMITTED YEARS PRIOR TO THE PASSAGE OF THE STATUTE UNDER WHICH HE WAS CONVICTED.

The Illinois Supreme Court has consistently held that a criminal statute will not be given a retroactive interpretation unless the legislature has made a clear expression of its intent to make the statute retroactive. *People* v. *Bote,* 376 Ill. 264; 33 N.E. 2d 449; *People* v. *Deatherage, et al.,* 401 Ill. 25; 81 N.E. 2d 581; *People* v. *Burman,* 19 Ill. 2d 579; 169 N.E. 2d 108 and *People* v. *Panczko,* 390 Ill. 398; 61 N.E. 2d 355.

In Section 28 of Chapter 38 of Illinois Revised Statutes, 1961 the legislature made no such expression that the statute should be made retroactive to offenses committed prior to its enactment. (Section 28 deals with gambling.)

However, in Section 22, Chapter 38 of Illinois Revised Statutes, 1961, the legislature specifically made this section retroactive by Section 22-40 when it stated previous convictions under any former narcotic statute should be considered a prior conviction for the purpose of the enhanced penalty provision. (Section 22 deals with narcotics) Section 22 and Section 28 were both enacted at the same time by the same legislature, had the same authors, and was sponsored by the same legislator.

For the Court to make this statute retroactive it deprived the defendant of "due process" both under the United States and Illinois Constitutions.

But to make it even a greater deprivation of his rights, the defendant was found guilty as a second offender under Section 28-1 (a) (3), Illinois Revised Statutes, 1961 (he knowingly kept a gambling device) and as a first offense it was shown that in 1958 he was found guilty under Paragraph 325, Illinois Revised Statutes, 1957. (He kept a common gambling house.) However the penalty provision under Section 28-1 specifically states that in order to receive the enchanced penalties the first conviction must fall within certain listed activities (a-3 through a-10), but "keeping a common gambling house" is not one of the crimes listed, and the information set forth in his 1958 conviction the defendant could not even be convicted as a first offender under Section 28-1 of the Illinois Revised Statutes, 1961, not to mention a second offender.

CONCLUSION

We respectfully submit that for the foregoing reasons this Court should grant the Petitioner a review of his case and that we feel that the opinion of the Supreme Court of the State of Illinois has created problems which need to be clarified both for the rights of the defendant and future persons falling victim to these problems presented in this appeal.

Respectfully submitted,

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APPENDIX A

Docket No. 39711—Agenda 14—November, 1966.
The People of the State of Illinois, Appellee. v.
Jimmy Williams, alias Kid Rivera, Appellant.

Mr. Justice House delivered the opinion of the Court:

The Defendant, Jimmy Williams, alias Kid Rivera, was convicted in a bench trial in the circuit court of Cook County on two counts of gambling. He was sentenced to six months in the county jail and fined $1,000 on each count, the jail sentences to run concurrently and the fines to be cumulative. Defendant appeals directly to this court alleging, among other things, a violation of his constitutional rights by reason of an illegal search and seizure.

At about 5 A.M. on April 19, 1964, Illinois State Police officers, armed with a warrant authorizing the seizure of numerous pairs of dice and a large table utilized for a dice game from the first floor of a building at 4025 18th Street in Chicago, entered the premises and found defendant and 33 other people standing around a dice table and a bar. Defendant and others were arrested and the arresting officers seized the dice table, dice (some with the number 4025 on them), playing cards, policy slips, and business cards imprinted with "Kid—4025 W. 18 St.—hrs. 11 to?" followed by a telephone number. A telephone bill was also found with defendant's name on it having the same number as that on the business card.

A four-count indictment was returned against defendant. Count I charged him with keeping a gambling device, a dice table, in violation of Section 28-1 of the Criminal Code of 1961. (Ill. Rev. Stat. 1963, Chap 38, par. 28-1

(a) (3).) Count II made the same charge as I and also alleged a previous conviction on April 17, 1958, as a keeper of a gambling house in violation of section 127 of division I of the Criminal Code. (Ill. Rev. Stat. 1957, chap. 38, par. 325.) The third count alleged that defendant kept a gambling place at 4025 W. 18th Street, Chicago, Illinois, in violation of section 28-3 of the Criminal Code of 1961. (Ill. Rev. Stat. 1963, chap. 38, par. 28-3.) Count IV alleged the same offense as in III and also alleged the same previous conviction as in count II. Conviction of a subsequent offense carries a more severe penalty than a first conviction.

Prior to trial defendant filed a motion to quash all four counts. The trial court held that the enhanced penalty provisions for subsequent offenders found in paragraphs 28-1 and 28-3 were inapplicable where the prior conviction charged in the indictment predated the effective date of the present criminal code, January 1, 1962. The court thereupon quashed counts II and IV for that reason. On motion of the State the cause was stricken with leave to reinstate, and a notice of appeal was filed pursuant to section 120-1 of the Code of Criminal Procedure. (Ill. Rev. Stat. 1963, chap. 38, par. 120-1.) The Appellate Court, First District, Second Division, reserved the order quashing counts II and IV and remanded with directions to reinstate those counts. (*People* v. *Williams,* 59 Ill. App. 2d 217.) The cause was reinstated, and the court found defendant guilty of counts II and IV and dismissed counts I and III. This appeal followed.

Defendant first contends that the search warrant should have been quashed and the evidence obtained suppressed. He argues that the complaint for a warrant was insufficient because it was based on unreliable hearsay statements of an informer. The complaint for the search war-

rant recites that two informers, who had furnished reliable information in the past, advised the complainant that on March 31, April 8, 12, and 15, 1964, they had witnessed dice games around a large covered table on the first floor on the building located at 4025 W. 18th Street, that they had participated in wagering at the dice table on these occasions, and that these games were frequented by numerous patrons. The complainant also stated that on March 17, 1964, he observed known gamblers enter the building and stay for long periods of time.

The question here again posed is whether hearsay evidence is sufficient to establish probable cause for the issuance of a search warrant. Following a decision of the Supreme Court (*Jones* v. *United States*, 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725) we have held hearsay evidence sufficient if there is substantial basis for relying upon it. (*People* v. *York*, 29 Ill.2d 68; *People* v. *Williams*, 27 Ill. 542.) Here, as in the prior *Williams* case, the affidavit set forth personal observations of informers who had furnished reliable information in the past. Furthermore, although not essential to establish probable cause, the informers' stories were corroborated by the affiant's statement that approximately two weeks before the informers' first visit, he had observed known gamblers enter the involved premises and stay for long periods of time. We hold that probable cause for the issuance of the warrant was shown.

Defendant also argues that the trial court erroneously admitted into evidence items which were obtained as a result of the search, but which were not mentioned in the search warrant. He further contends that the items not mentioned in the warrant, namely, the records, playing cards, business cards, and telephone bill, were merely

seized for evidentiary purposes and could not be seized even under a valid search warrant. The State, on the other hand, argues that the items objected to were obtained as a result of a search incident to a lawful arrest, and they they were proper objects of a search and seizure items used in a criminal enterprise.

It is well established that defects in a search warrant are immaterial if the search can be otherwise justified. (*People* v. *Brinn*, 32 Ill. 2d 232, 241, and cases therein cited.) It is also settled that a reasonable search incident to a lawful arrest is proper. (*People* v. *Brinn*, 32 Ill. 2d 232, 241 and other cases cited therein.) We think the officers had reasonable ground to believe that gambling offenses were being committed when they entered the room and saw a dice table and dice on it and a number of people standing around it at about 5 o'clock in the morning. Although some of the items seized were not listed in the search warrant, they were properly seized in a search incident to a lawful arrest. Furthermore, the records, telephone bill, playing cards and business cards were all items so closely related to the business of keeping a gambling house it is not unreasonable to consider them as used to carry on such a business. (See *Marron* v. *United States*, 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74). The admission of these items into evidence did not constitute error.

Defendant next contends that he cannot be penalized as a subsequent offender under section 28-1 or 28-3 (Ill. Rev. Stat. 1965, chap. 38, par. 28-1, 28-3,) for the reason that his earlier conviction for keeping a gambling house was prior to the effective date of the Criminal Code of 1961, January 1, 1962. He argues that the court must give a retroactive interpretation to sections 28-1 and 28-3, contrary to legislative intent, in order to sentence him as a

subsequent offender. As noted earlier, this same question was presented to the Appellate Court, First District, in *People* v. *Williams*, 59 Ill. App. 2d 217. That court held the provisions relating to enhanced penalties for subsequent offenders applicable to defendant. We are of the opinion that the Appellate Court properly held the enhanced penalties applicable to subsequent offenses where the first such offense occurred prior to the effective date of the Criminal Code of 1961.

Defendant's final contention is that the State failed to prove him guilty beyond a reasonable doubt. It is well established that we will not disturb the findings of the trier of fact and substitute our own conclusions unless the proof is so unsatisfactory as to justify a reasonable doubt as to defendant's guilt. (*People* v. *Boney*, 28 Ill. 2d 505; *People* v. *Means*, 27 Ill. 2d 11). After a careful examination of the record we cannot say that the conclusion of the trial court was unwarranted.

The People point out that defendant was convicted on count IV as a subsequent offender under section 28-3 which provides for a $1000 fine or imprisonment "in the penitentiary from one to three years, or both," but that the trial court sentenced him to six months in jail and imposed a fine of $1000. They suggest that we regard this six-month jail sentence as a nullity. It is so considered and is vacated.

The judgment of the circuit court of Cook County, as modified, is affirmed.

Judgment modified and affirmed.

Mr. Justice Ward took no part in the consideration or decision of this case.

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of January in the year of our Lord, one thousand nine hundred and sixty-seven, within and for the State of Illinois.

PRESENT: ROY J. SOLFISBURG, JR., CHIEF JUSTICE
JUSTICE WALTER V. SCHAEFER
JUSTICE BYRON O. HOUSE
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE RAY I. KLINGBIEL
JUSTICE ROBERT C. UNDERWOOD
JUSTICE DANIEL P. WARD
WILLIAM G. CLARK, ATTORNEY GENERAL
ROBERT G. MILEY, MARSHAL
ATTEST: MRS. EARLE BENJAMIN SEARCY, CLERK

Be It Remembered, that, to-wit: on the 19th day of January, A.D. 1967, the same being one of the days of the term of Court aforesaid, the following preceedings were, by said court, had and entered of record, to-wit:

People State of Illinois, — Appellee
No. 39711 vs.
Jimmy Williams, alias: Kid Rivera, — Appellant

Appeal from Circuit Court Cook County (Criminal Division) 64 - 1924

And now, on this day, this cause having been argued by counsel and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and preceedings aforesaid, nor in the rendition of the judgment of the Circuit Court of

Cook County (Criminal Division), except for imposing the six-months jail sentence on count IV, is there anything erroneous, vicious or defective, and in that part of the record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Cook County (Criminal Division), except for the six-months jail sentence imposed on count IV, which is regarded as a nullity and vacated, Be Affirmed In All Things And Stand In Full Force And Effect As Modified, notwithstanding the said matter and things therein assigned for error.

I, Mrs. Earle Benjamen Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof. I have hereunto subscribed my name and affixed the Seal of said Court this day of A.D. 19 .

Clerk,
Supreme Court of the State of Illinois.

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of March in the year of our Lord, one thousand nine hundred and sixty-seven, within and for the State of Illinois.

PRESENT: ROY J. SOLFISBURG, JR., CHIEF JUSTICE
JUSTICE WALTER V. SCHAEFER
JUSTICE BYRON O. HOUSE
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE RAY I. KLINGBIEL
JUSTICE ROBERT C. UNDERWOOD
JUSTICE DANIEL P. WARD
WILLIAM G. CLARK, ATTORNEY GENERAL
ROBERT G. MILEY, MARSHAL
ATTEST: MRS. EARLE BENJAMIN SEARCY, CLERK

BE IT REMEMBERED, that, to-wit: on the 27th day of March, A.D. 1967, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

People State of Illinois, Appellee
No. 39711 vs.
Jimmy Williams, etc., Appellant
} Appeal from Circuit Court Cook County (Criminal Division)

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX B

COMPLAINT FOR SEARCH WARRANT

WILLIAM L. HERRMANN complainant now appears before the undersigned judge of the Circuit Court of Cook County and request the issuance of a search warrant to search 4025 West 18th St., first floor, Chicago, Illinois, and seize the following instruments, articles and things which have been used in the commission of, or which constitute evidence of, the offense of gambling, to wit one large square table utilized for a dice game, along with numerous pairs of dice.

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above:

> Two informers, who have furnished reliable information in the past, advise that they have witnessed gambling going on at the above-described premises, to wit, dice games frequented by numerous patrons. On 3/31/64, 4/8/64, 4/12/64, 4/13/64, and 4/15/64, these two informers gained entrance to the premises at 4025 W. 18th St. through the front door. They then entered the first floor apartment, turned to their right and proceeded into a room where a large square table was situated in the center. Said table was covered with a green cloth and from 20 to 25 men were gathered around the table engaged in a dice game. 15 or 20 other people were looking on.
>
> During the time informers were in this room on each of these dates (between 1:00 A.M. and 5:00 A.M.),

they placed several wagers at this dice table. Complainant further states that on 3/17/64, between 6:00 A.M. and 7:00 A.M. he observed known gamblers enter the building at 4025 W. 18th St. and remain in the aforesaid premises for long periods of time. Wherefore, the complainant prays that a search warrant may issue according to law.

/s/ William L. Herrmann

Subscribed and sworn to before me on April 18th, 1964.

/s/ Alfonse F. Wells

SEARCH WARRANT

ON THIS DAY April 18, 1964, COMPLAINANT, HAS SUBSCRIBED and sworn to a complaint for search warrant before me. Upon examination of the complaint I find that it states facts sufficient to show probable cause and I therefore command that 4025 West 18th St., 1st floor, Chicago, Illinois, be searched and the following instrument, articles and things which have been used in the commission of, or which constitute evidence of, the offense of gambling be seized therefrom: to wit one large square table utilized for a dice game, along with numerous pairs of dice.

I further command that a return of anything so seized shall be made without unnecessary delay before me or before Judge Alexander Napoli or before any court of competent jurisdiction.

/s/ Alfonse F. Wells

Judge

Time and date of issuance 8:45 A.M. April 18th, 1964.

SUPREME COURT OF THE UNITED STATES

NO. ....., TERM, 1967

JIMMY WILLIAMS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

The clerk will enter my appearance as counsel for the Petitioner.

.....

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